IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

(Wheeling Division)

CHARLES C. CUMPTAN and DEBORAH V. CUMPTAN,

Plaintiffs, **CIVIL ACTION NO.: 5:10-CV-00012**

VS.

ALLSTATE INSURANCE COMPANY, and LARRY D. POYNTER, individually, and ED STEEN, individually,

Defendants.

DEFENDANT ALLSTATE INSURANCE COMPANY'S REPLY IN FURTHER SUPPORT OF ITS AMENDED MOTION TO DISMISS

COMES NOW the Defendant, Allstate Insurance Company, hereinafter referred to as "Allstate," by and through its counsel, Walter M. Jones, III, Michael M. Stevens and Martin & Seibert, LC, and respectfully submits the following reply in support of its Amended Motion to Dismiss.

1. Plaintiffs cannot avoid that their lawsuit against Allstate is barred by the "two dismissal rule." Their claims against Allstate fail as a matter of law under that rule, which in itself justifies dismissal here.

2. Plaintiffs cannot avoid that an express contract exists and governs the relationship between the parties. This bars plaintiffs' unjust enrichment claim against Allstate.

3. To the extent plaintiffs are asserting a "conspiracy" claim against Allstate, that claim fails as a matter of law.

4. With regard to plaintiffs' claims being time-barred, Allstate included its statute of limitation argument because this Court granted leave for Allstate to resubmit its dismissal motion and brief with a complete copy of the 1990 state court complaint. (*See* September 23, 2010 Order, Docket 24, at 6.) Allstate understands that this Court's decision on the statute of limitations issue in the *Marple* and *Ash* cases, also filed by plaintiffs' counsel, may apply here.[1] Nonetheless, in addition to complying with this Court's September 23, 2010 Order, Allstate included the argument in its opening brief in order to preserve it for appeal.

In all events, though, plaintiffs' claims against Allstate fail as a matter of law based on the two dismissal rule, so Allstate respectfully moves this Court to dismiss plaintiffs' claims against Allstate in their entirety.

ARGUMENT

I. PLAINTIFFS' LAWSUIT AGAINST ALLSTATE IS BARRED BY THE "TWO DISMISSAL RULE."

As discussed in detail in the Allstate's opening brief (at pp. 12-17), plaintiffs' lawsuit against Allstate is barred by the "two dismissal rule," which allows a plaintiff to re-file the same claim following a voluntary dismissal only once before attaching prejudice to the action. *See, e.g., Manning v. South Carolina Dep't of Highway & Pub. Transp.,* 914 F.2d 44, 47 (4th Cir. 1990); *Wahler v. Countrywide Home Loans, Inc.*, 2006 WL 2882495 (W.D.N.C. Oct. 5, 2006) (same principle);[2] *Gabhart v. Craven*

[1] *Ash v. Allstate Ins. Co., et. al.*, United States District Court for the Northern District of West Virginia, Civil Action No. 5:10-CV-5; *Marple v. Allstate Ins. Co., et. al.,* United States District Court for the Northern District of West Virginia, Civil Action No. 5:10-CV-3.

[2] Copies of unpublished decisions cited herein were previously attached as Exhibit "B" to Allstate's Memorandum of Law in Support of Motion to Dismiss as filed on January 29, 2010 (Docket No. 6) with said exhibit incorporated herein by reference.

Regional Med. Ctr., 73 F.3d 357, 1995 WL 764240 (4th Cir. 1995) (unpublished decision) (same principle).

Applying the above case law here, the instant lawsuit is clearly barred by the two dismissal rule. As discussed fully in Allstate's opening brief, plaintiffs filed a lawsuit against Allstate in May 1990, arising from the same automobile accident at issue in the instant case, based on Allstate's alleged failure to pay them the full amount of UIM benefits allegedly owed them, and they voluntarily dismissed Allstate from that lawsuit on September 5, 1990. On December 2, 2009, plaintiffs filed a second lawsuit against Allstate, this time also naming the Adjuster Defendants, substantively identical to the instant lawsuit, which they voluntarily dismissed on December 15, 2009. While certain of the causes of action may be different, it is clear that all three lawsuits here arise from the same facts -- *i.e.,* the automobile accident in which plaintiffs were injured and their claim that coverage exists under the relevant Allstate policy -- and assert fundamentally the same claims -- *i.e.,* plaintiffs' alleged entitlement to additional underinsured motorist coverage benefits. This is precisely the scenario presented in the above cases in which the courts dismissed a third lawsuit based on the "two dismissal" rule.

Moreover, with regard to plaintiffs' argument that they did not seek stacking in the 1990 suit, the fact is the two dismissal rule applies even when the theories or claims asserted in the suits are not identical. For example, in *Manning,* a dispute involving the alleged wrongful condemnation of the plaintiff's land, the plaintiff filed a suit in 1982 naming as defendants the Highway Department and other individuals involved in the condemnation proceeding. The plaintiff voluntarily dismissed the suit on January 28, 1982. On June 5, 1985, he filed a state action naming Evans and other defendants alleging, inter alia, claims for violation of constitutional rights, conspiracy and fraudulent misrepresentation. On July 9, 1985, plaintiff voluntarily dismissed the individual defendants from that suit. On June 11, 1985, the plaintiff re-filed the case before the *Manning* court, naming as defendants the State of South Carolina, the Highway Department and various individuals, including Evans. This action asserted claims for constitutional and RICO violations, abuse of process, fraud and deceit. 914 F.2d at 46-47. The court held the two dismissal rule applied even though the causes of action were not identical to those previously asserted.

Similarly, in *Gabhart*, the Court noted that the case before it was the third action filed by Gabhart alleging he was wrongfully discharged. The previous two actions were filed in North Carolina state court and voluntarily dismissed. Noting that North Carolina had a two dismissal rule substantively identical to Fed. R. Civ. P. 41(a), the Court found the rule barred Gabhart's third action. In so ruling, the Court rejected Gabhart's argument that he was "proceeding on different legal theories" in his first two actions, and held that Gabhart's prior state court actions, while alleging different causes of action, involved the same underlying facts and were "fundamentally the same." 1995 WL 764240 , **1-2.

As *Manning* and *Gabhart* show, the "two dismissal" rule applies even if the suits involve different causes of action and/or legal theories, so long as the underlying facts are fundamentally the same. Here, this standard squarely brings the two dismissal rule into play, since *all* the lawsuits brought by plaintiffs arise under same underlying facts -- *i.e.,* their injury in the relevant automobile accident and their seeking of underinsured motorist coverage benefits from Allstate. Here, as in *Manning* and *Gabhart,* the two dismissal rule plainly applies.

Plaintiffs cite *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery,* 534 F.2d 1012 (2d Cir. 1976), for the proposition that the "two dismissal" rule does not apply when one of the dismissals results from a settlement and agreement by the parties. (Pl. Brf. at 6.) Plaintiffs are wrong. *Poloron* held only that the two dismissal rule did not apply in that case because the first dismissal was without prejudice, so that it could be inferred that the plaintiffs had not affirmatively indicated they would not pursue their claims against the defendants. 534 F.2d at 1017-18. Here, by contrast, as Exhibit "C" to Allstate's opening brief plainly shows, the first dismissal was *with* prejudice. Accordingly, *Poloron* has no bearing here, and courts have so held.[3] *See, e.g., Schott v. Hepler,* 101 F.R.D. 99, 101 (N.D. Ind. 1984) (finding *Poloron* inapposite where "first dismissal, which admittedly was upon stipulation, was with prejudice").

Plaintiffs argue that Allstate has implicitly conceded that plaintiffs' first suit, which was settled in 1990, did not arise from the same facts and assert fundamentally the same claims as plaintiffs' other two suits, by virtue of Allstate's not seeking dismissal based on the doctrine of accord and satisfaction. (Pl. Brf. at 6.) Allstate in fact fully plans to move based on the doctrine of accord and satisfaction, among other grounds, on summary judgment if this case survives the simple motion to dismiss grounds Allstate has chosen to raise. There is *no* requirement that Allstate move on the accord and satisfaction ground, or any other ground, at the dismissal stage.

[3] Exhibit "C" of Allstate's Memorandum of Law in Support of Motion to Dismiss as filed on January 29, 2010, Docket No.6, as amended on October 13, 2010, Docket No. 26-2, is incorporated herein by reference.

Plaintiffs also claim that the fact the previously missing page 5 of the 1990 complaint discusses only one $100,000 policy limit shows the issue of stacking was not raised in that suit, and therefore that the "two dismissal" rule does not apply. (Pl. Brf. at 6.) However, the reference to the $100,000 policy limit makes no difference, because, as discussed above, there is no question that the 1990 lawsuit, like the subsequent lawsuits, arose from the same facts -- *i.e.,* the automobile accident in which plaintiffs were involved -- and asserted the same sort of claims regarding plaintiffs' alleged entitlement to additional UIM benefits.

Contrary to plaintiffs' contention (at p. 7), the fact that only Allstate, but not the Adjuster Defendants, was named in the original suit also makes no difference. As with the individual defendant in *Manning*, who was not named in the original lawsuit in that case, the legal rights of the Adjuster Defendants, which turn on plaintiffs' alleged entitlement to additional UIM benefits, were clearly implicated in the original lawsuit. Moreover, like the North Carolina two dismissal rule at issue in *Gabhart,* West Virginia's two dismissal rule does *not* include any requirement that both actions be against the same defendant. Rather, the Rule plainly states that "a notice of dismissal operates as adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action *based on or including the same claim*." *See* W. Va. R. C. P. 41(a) (emphasis added). Because the two dismissals plaintiffs filed were unquestionably "based on or including the same claim," the "two dismissal" rule conclusively bars plaintiffs' current lawsuit against Allstate regardless whether the Adjuster Defendants were named in the 1990 lawsuit. In any event, this argument cannot possibly apply to Allstate, since Allstate was certainly a named defendant in all three suits.

II. PLAINTIFFS' UNJUST ENRICHMENT CLAIM AGAINST ALLSTATE FAILS BECAUSE IT ARISES FROM AN EXPRESS CONTRACT WHICH GOVERNS THE SUBJECT MATTER IN DISPUTE.

As discussed in Allstate's opening brief (at pp. 10-12), plaintiffs' unjust enrichment claim, which they allege against Allstate only, fails because a party cannot bring an unjust enrichment claim where, as here, an express contract governs the subject matter in dispute. *See, e.g., Bright v. QSP, Inc*., 20 F.3d 1300, 1306 (4th Cir. 1994), *cert. denied,* 513 U.S. 875 (1994) (applying West Virginia law, and stating that, because an "action for unjust enrichment is quasi-contractual in nature[, it] may not be brought in the face of an express contract") (citations omitted); *Johnson v. Ross,* 2009 WL 4884374, *4 (S.D. W. Va. Dec. 10, 2009) ("Unjust enrichment is an equitable, rather than legal, claim for relief. It is a court-developed theory of relief intended to be employed in the absence of a formal contract. Because legal remedies are favored over equitable remedies, a formal contract governing the subject matter at issue precludes an unjust enrichment claim") (citation omitted).

Plaintiffs argue *Bright* is inapposite, because plaintiffs are "not seeking to recover amounts incurred in performance of a contract which benefited Allstate," but instead are seeking to recover amounts Allstate "withheld from them in violation of West Virginia law." (Pl. Brf. at 17-18.) This attempted distinction is unavailing, however, because the "amounts Allstate withheld" are the very stacked coverage amounts Allstate allegedly owes plaintiffs under their insurance contract. Plaintiffs cannot avoid that, as in *Bright,* an express contract does in fact govern the subject matter in dispute.

Plaintiffs' reliance on *LaPosta Oldsmobile, Inc. v. General Motors Corp*., 426 F. Supp. 2d 346 (N.D. W. Va. 2006), fails for the same reason. In *LaPosta,* an automobile dealer brought an action against GM for, *inter alia,* unlawful termination of a dealer franchise agreement, breach of contract, and unjust enrichment. The court rejected GM's argument that the unjust enrichment claim failed in light of the Dealer Agreement between the parties, because the terms of the Dealer Agreement did not cover the subject matter alleged in the unjust enrichment claim. *Id.* at 356. The court explained "LaPosta claims that it has spent substantial time and resources over the last thirty-two years and has expended valuable time and money promoting and developing the Oldsmobile brand. It contends that the elimination of the Oldsmobile line allows GM to appropriate goodwill created by LaPosta without just compensation." *Id.* The court held the plaintiff's unjust enrichment claim was not precluded, because the "express terms of the Dealer Agreement do not cover the identical subject matter alleged in LaPosta's complaint." *Id.*

Here, by contrast, plaintiffs' unjust enrichment claim can only arise from Allstate's failure to pay them stacked UIM benefits, which are allegedly due them pursuant to their insurance contract with Allstate. If there is no right to stack here, there can be no unjust enrichment, plain and simple. Accordingly, unlike in *LaPosta,* the terms of the contract here do in fact cover the subject matter of plaintiffs' unjust enrichment claim, which bars that claim.

Plaintiffs' attempt to distinguish *Johnson* also fails. According to plaintiffs, unlike in *Johnson,* they have not pled a pure breach of contract as the basis for their unjust enrichment claim. (Pl. Br. at 18.) As noted above, however, it is clear that plaintiffs' unjust enrichment claim can be based only on Allstate's failure to pay them stacked UIM benefits pursuant to the terms of their insurance policy, because otherwise plaintiffs can have no claim at all.

Moreover, that plaintiffs have not actually asserted a claim for breach of contract is irrelevant. Plaintiffs ignore the case law, cited in Allstate's opening brief, which expressly holds the principle that an unjust enrichment claim fails when an express contract exists applies even where, as here, the plaintiff is not asserting a claim for breach of contract. *See, e.g., Icebox-Scoops v. Finanz St. Honore, B.V.*, 2009 WL 3838276, *11 (E.D.N.Y. Nov. 16, 2009) (dismissing unjust enrichment claim where a contract existed concerning the same subject matter, even though plaintiff was not a party to the contract and was not asserting a breach of contract claim); *Phrasavang v. Deutsche Bank*, 2009 WL 3047320, *9 (D.D.C. Sept. 23, 2009) (dismissing unjust enrichment claim because an express agreement existed, and stating: "Although the plaintiff argues that this principle does not apply here because he is not attempting to enforce the loan agreement, but rather seeking damages under an unjust enrichment theory for benefits allegedly obtained . . . , that does not negate the fact that the alleged wrong stems from the contract he entered into with the defendant").

Taking plaintiffs' Complaint allegations as true, an express contract indisputably governs the subject matter in dispute. Plaintiffs are complaining of an alleged bad faith failure to pay stacked insurance benefits pursuant to UIM coverages under an *automobile insurance contract* issued by Allstate. Moreover, as in *Icebox-Scoops* and *Phrasavang,* that plaintiffs are not asserting a claim for breach of contract makes no difference. From the face of the Complaint, it is clear plaintiffs' unjust enrichment claim arises from an express contract, so that claim fails as a matter of law.

III. PLAINTIFFS' CONSPIRACY CLAIM FAILS AS A MATTER OF LAW.

Plaintiffs maintain that what they are really complaining about is a "conspiracy" between Allstate and the Adjuster Defendants. (Pl. Brf. at 12.) Plaintiffs' contention that "conspiracy" is even an issue in this case is puzzling, because the Complaint is devoid of any conspiracy allegations. There is no count for conspiracy and the word is not even mentioned in the Complaint. Nor can plaintiffs be heard to argue that supposed allegations of "joint action" between the Adjuster Defendants and Allstate amount to allegations of "conspiracy," since the Complaint lacks any such allegations. *See, e.g., Hastings v. Sevison*, 2009 WL 790010, *5 (D. Utah Mar. 24, 2009) (dismissing plaintiff's conspiracy claim based on insufficient complaint allegations, and noting: "Indeed, Plaintiffs' complaint does not even mention a conspiracy"); *Serrano Medina v. U.S.,* 709 F.2d 104, 106-07 (1st Cir. 1983) (same principle, stating: "The complaint does not mention a conspiracy or state facts from which the existence of a conspiracy might be inferred").

This issue was expressly addressed by this Court in its remand Orders in *Ash* and *Marple, supra.* In both these cases, which reflected substantively identical complaint language, this Court found these complaints devoid of viable conspiracy allegations. (*Ash* Remand Order at 5-6; *Marple* Remand Order at 6-7.) [4]

In any event, even more fundamentally, as a matter of law plaintiffs cannot state a claim for "conspiracy" against Allstate. It is well settled that a civil conspiracy requires

[4] (Civil Action No. 5:10-CV-3 at Docket No. 25; (Marple); Civil Action No. 5:10-CV-5 at Docket No. 25. (Ash)).

concerted action by two or more persons or entities, *see, e.g., Dixon v. American Industrial Leasing Co.,* 162 W. Va. 832, 834, 253 S.E.2d 150, 152 (1979), and equally well settled that, under the no intra-corporate conspiracy doctrine, a corporation cannot conspire with its employees, *see, e.g., Ridgeway Coal Co., Inc. v. FMC Corp*., 616 F. Supp. 404, 408 (S.D. W. Va. 1985).

For example, in *Ridgeway*, the court dismissed a civil conspiracy claim where, as here, the plaintiffs alleged that the defendant corporation and two of its employees conspired with one another. The court stated, in language equally applicable here:

> It is a well-settled principle of law that civil conspiracy requires concerted action by two or more persons or entities. Because of the requirement of more than one entity for actionable civil conspiracy, several courts have ruled that a corporation cannot conspire with its employees. A corporation can only act through its employees. To hold that a corporation can conspire with its employees would be to effectively hold that a corporation could conspire with itself. Any acts undertaken by Curry with respect to the Orgas property would have been in the course of his employment with FMC. His acts are the acts of FMC. Being but an agent of the corporation, he cannot be said to have conspired with it.

616 F. Supp. at 408-09 (citing *Dixon, supra*). The *Ridgeway* court held that, because of the no intra-corporate conspiracy doctrine, the plaintiffs "could prove no set of facts which would entitle them to relief under the legal theories advanced," including their conspiracy theory. *Id.* at 410. *See also U.S. v. Gwinn*, 2008 WL 867927, *20, *25 (S.D. W. Va. Mar. 31, 2008) (citing *Grose v. Mansfield Corr. Inst.,* 2007 WL 2781654 (N.D. Ohio Sept. 24, 2007) for the principle that "under the intracorporate conspiracy doctrine, two employees or agents of the same corporation cannot form a conspiracy with one another because they are not considered 'two or more separate persons'";

further noting "it is clear that the Fourth Circuit accords a significant amount of weight to the basic principle that it is a legal impossibility for a corporation to conspire with its agents, and likewise, for its agents to conspire with one another").

Here, too, even if plaintiffs had attempted to allege any facts showing "conspiracy" (they did not), any such claim would be precluded by the no intra-corporate conspiracy doctrine. As in the above cases, Allstate, as a corporation, cannot conspire with its employees, and the Adjuster Defendants, as agents of the corporation, cannot be said to have conspired with Allstate.

Nor can plaintiffs be heard to argue that the exceptions to the no intra-corporate conspiracy doctrine apply here: *i.e.,* (a) the "independent personal stake" exception, when the agent has a personal stake in the alleged illegal activity independent of his relationship with the corporation; or (b) the "unauthorized act" exception, when the agent is alleged to have acted outside the scope of his authority or employment. *U.S. v. Gwinn*, 2008 WL 867927 (S.D. W. Va. Mar. 31, 2008). The "independent personal stake" exception does not apply, because plaintiffs do not allege, nor can they, that either of the Adjuster Defendants had a personal stake, independent of their relationship with Allstate, in the alleged wrongful conduct of failure to pay plaintiffs additional UIM coverage. The "unauthorized act" exception also does not apply, because plaintiffs specifically allege the Adjuster Defendants were acting within the scope of their employment when they engaged in the alleged wrongful conduct (Compl., ¶¶ 4-5), and they certainly do not allege the Adjuster Defendants were acting outside the scope of their authority or employment. This is the very situation that existed in *Gwinn,* where the court rejected application of the two exceptions. *See, e.g., Gwinn,* 2008 WL

867927, *25 (noting the "unauthorized act" exception was "not applicable because the Government did not allege in its Complaint that Defendants acted outside the scope of their employment," and that the "independent personal stake" exception did not apply, because: "Where a corporation's success is directly dependent on the agent's success in furthering the illegal activity, the two are directly related and are not 'wholly independent' of one another. If one benefits, so will the other").

CONCLUSION

For all the foregoing reasons, as well as those set forth in its opening brief, defendant Allstate Insurance Company respectfully submits that plaintiffs' Complaint against Allstate should be dismissed with prejudice and without leave to amend, in its entirety, based on the "two dismissal" rule. At the very least, the unjust enrichment and conspiracy claims against Allstate should be dismissed with prejudice and without leave to amend.

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CERTIFICATE OF SERVICE

I, Michael M. Stevens, hereby certify that on the **3rd** day of **November**, **2010**, I electronically filed ***Defendant Allstate's Reply in Further Support of Its Amended Motion to Dismiss*** with the Clerk of the Court using the CM/ECF system which will send notification of such filing, to the following:

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